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In the
Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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On July 16, 2003, petitioners submitted a supplemental brief to bring to this Court's attention the Federal Circuit's decision in *Thompson* v. *Cherokee Nation*, 334 F.3d 1075 (2003). On August 18, 2003, the government filed a petition for rehearing and rehearing en banc in that case, and it advised this Court that it had done so by letter dated August 25, 2003. On September 12, 2003, the Federal Circuit denied the government's petition for rehearing en banc. Counsel for petitioners informed the Court of that action by letter dated September 16, 2003. We submit this supplemental brief to inform the Court that, in light of *Thompson*, the government does not oppose further review in this case.

The central question in this case is whether funding for the payment of petitioners' "contract support costs" was

available within the meaning of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n. The ISDA makes the government's obligation to pay such costs "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). That condition on the government's payment obligations reflects the fact that, under the ISDA, the Tribe is substituted for a federal agency in furnishing governmental services. A federal agency administering those programs directly would be constrained by the availability of appropriations and the allocation of funds among its programs; Section 450j-1(b) places Tribes taking over those programs in a similar position. In other words, Section 450j-1(b) ensures that Tribes choosing to administer programs in place of a federal agency are subject to the same funding restraints the federal agency would face if it continued to administer those programs itself.

As petitioners note in their supplemental brief, the decision in this case and the Federal Circuit's decision in *Thompson* do reach different results on whether funds were available to pay contract support costs within the meaning of Section 450j-1(b). We agree, moreover, that the decisions genuinely conflict with each other on several issues, including the effect of Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, tit. II, § 314, 112 Stat. 2681-288 (1998), on the "availability" of federal funding for contract support costs for fiscal years 1994 through 1998. It does not appear, however, that the conflict has broad forward-looking significance at the present time. Since fiscal year 1998, Congress has

regularly included *express* caps on funding for contract support costs in the annual appropriations legislation that funds Indian Self-Determination Contracts.[1] There is no disagreement that such express caps render sums beyond the amounts specified by Congress "unavailable" within the meaning of the ISDA. See Pet. Supp. Br. App. 11a; see also *id.* at 21a-22a. As a result, disputes such as the present one, which concern the availability of money for the purpose of paying contract support costs, are unlikely to arise in the future. There are, however, several pending cases (including one class action) that concern years before Congress began to use express funding caps. Those cases expose the Indian Health Service to potential liability of approximately $100 million.

In addition, the Federal Circuit's construction of one provision, 25 U.S.C. 450j-1(b)(3), in *Thompson* may have ongoing programmatic consequences for the Indian Health Service and the Department of Health and Human Services. See Pet. Supp. Br. App. 28a-29a. To the extent that *Thompson* construed Section 450j-1(b)(3) as deeming funds that are needed for inherently federal functions—such as paying the salaries and other expenses necessary to have an Indian Health Service at all—to be nonetheless "available" to pay Tribes under the ISDA, it defies common

[1] See, *e.g.*, Consolidated Appropriations Resolution, 2003, P.L. No. 108-7, 117 Stat. 11, 260-61 (2003) (capping ongoing contract support costs at $270,734,000, and capping new contract support costs at $2,500,000); Department of the Interior and Related Agencies Appropriation Act 2002, Pub. L. No. 107-63, 115 Stat. 414, 456 (2001); Department of the Interior and Related Agencies Appropriation Act, 2001, Pub. L. No. 106-554, 114 Stat. 2673, 2673-214 (2000); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 to 1501A-182 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998); Consolidated Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997).

sense and threatens the agency's proper functioning. The Indian Health Service is required by statute to exist, 25 U.S.C. 1631, and to administer a variety of programs for the benefit of the Tribes. Section 450j-1(b)(3), and the concept of "availability" more generally, cannot reasonably be understood to require the Indian Health Service to pay tribal contractors appropriated funds the agency needs to fulfill its statutory mission (or to require it to contract for payments that it cannot reasonably make if it is to retain sufficient funds to perform the functions that must continue to be performed by the federal government rather than the Tribes). Doing so would inevitably "reduce funding for [other] * * * activities serving a tribe" in violation of 25 U.S.C. 450j-1(b), since serving the health interests of the Tribes and their members *is* the Indian Health Service's function.

We note, however, that the court of appeals' decision in this case did not specifically address the meaning or effect of 25 U.S.C. 450j-1(b)(3). It is thus not clear that this case presents an appropriate vehicle for further review. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (Court ordinarily does "not decide in the first instance issues not decided below"). *Thompson*, by contrast, did address that issue, and petitioner Cherokee Nation in this case was a party in *Thompson* as well. If further review is sought in that case, it would be a more appropriate vehicle for the issue's consideration. It is possible, moreover, that the Court's resolution of other matters specifically addressed by the court of appeals in this case and raised in the petition might in any event make it unnecessary for the Court to reach the construction of 28 U.S.C. 450j-1(b)(3), as well as other issues concerning when funds should be regarded as "available" for payment provided for under contracts.

Nonetheless, on balance, the government does not oppose further review in this case.

Respectfully submitted.

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